

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8582 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

GSRTC

Versus

S.T. WORKERS' UNION

Appearance:

MR HARDIK C RAWAL for Petitioner
NOTICE SERVED for Respondent No. 1
MR DG CHAUHAN for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 24/09/1999

ORAL JUDGEMENT

Heard Mr. Raval for the petitioner and Mr.
Chauhan for the respondent No. 2. None present for
respondent No. 1.

2. On joining the Government service, or the service in any corporate body, a person does not mortgage or barter away his basic rights as a human being including his fundamental rights in favour of the State. The Government or the corporate body only because it has power to appoint does not become master of the body or the soul of the employee. The fundamental rights including right to life under Article 21 of the Constitution of India or the basic human rights are not surrendered by the employee. The Government by providing job opportunities to its citizens only fulfils its obligations under the Constitution including the directive principles of the State Policy. The employee on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer like instrumentalities of the State or the Statutory or the Autonomous corporation etc. is regulated by the terms of contract of service or the service rules made by the Central Government or the State Government under Proviso to Art. 309 of the Constitution or the other statutory rules including certain Standing Orders. Where an employee was not provided any subsistence allowance during the period of suspension, the employee has been punished in total violation of the principles of natural justice. Moreover, on account of his penury occasioned by non payment of subsistence allowance during the pendency of permission application, he could not undertake journey to attend the proceedings from his home town. The suspension notwithstanding nonpayment of subsistence allowance is inhuman act which has unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demolished and his salary is also paid to him at a reduced rate under the nick name of subsistence allowance so that the employee may sustain himself. The very object of paying reduced salary to the employee during the period of suspension would be frustrated if even the subsistence allowance is not paid because the subsistence allowance would mean supporting life especially minimum livelihood. The act of non payment of subsistence allowance can be linked with slow poisoning an employee if not permitted to sustain himself on account of non payment of subsistence allowance would gradually starve himself to death.

2. In this matter, the order passed by the Industrial Tribunal, Ahmedabad in Reference (IT) NO. 26 of 1986 dated 28th January, 1988 has been challenged by the petitioner Corporation. The facts of the present case are that the respondent no. 2 workman was employed

as driver of the petitioner Corporation. A regular departmental inquiry was held against the respondent No. 2 for his having participated in the village panchayat election and got himself elected as Sarpanch and since the disciplinary authority came to the conclusion that the respondent No. 2 was guilty of committing breach of the resolution and that he has committed misconduct, he was suspended from service with effect from 5th April, 1987. The petitioner Corporation has taken the decision after the departmental inquiry to dismiss the respondent NO. 2 but the respondent NO. 2 was a protected workman and, therefore, the corporation was required to obtain permission from the Conciliation Officer under sec. 33(3) of the Industrial Disputes Act, 1947 ("the ID Act" for short). The petitioner Corporation has filed the permission application and simultaneously, also passed an order dated 5th April, 1980 to suspend the petitioner's service without any wages and subsistence allowance. After filing the permission under sub clause (3) of section 33 of the ID Act, subsequently, it was found that there was no proceedings pending before the Conciliation Officer and, thereupon, the second respondent was dismissed from service with effect from 27th July, 1982. The respondent No. 2, therefore, raised an industrial dispute claiming benefit of full wages for the period from 5th April, 1980 to 27th July, 1982. The industrial dispute was raised by the second respondent through union which was referred for adjudication to the industrial tribunal Ahmedabad being Reference (IT) No. 26 of 1986 for payment of full wages with effect from 5th April, 1980 to 27th July, 1982. The Tribunal, under its award dated 28th January, 1988, directed the petitioner Corporation to pay to the second respondent the wages from 5th April, 1980 to 27th July, 1982. Said award of the Industrial Tribunal has been challenged by the petitioner Corporation in this petition under Article 226 and 227 of the Constitution of India. This petition was admitted on 29th December, 1988 and the ad-interim relief was granted which was subsequently ordered to continue till further orders.

In the present petition, the petitioner Corporation has pointed out the decision reported in 23(2) GLR 708 in case of Mansinh Parmar versus Gujarat State Road Transport Corporation. The petitioner has also relied upon the decision of the apex Court reported in AIR 1959 page 1342. In paragraph 5 of the petition, the petitioner Corporation has pointed out that without prejudice to the contentions as aforesaid, it is respectfully submitted that the respondent workman was not entitled to full back wages and that he was entitled

only to the subsistence allowance which was required to be fixed by the Tribunal. Said submission of the petitioner Corporation is covered by the decision of the apex Court reported in AIR 1986 SC page 1168.

The Tribunal has also considered the provisions of section 33 (1)(3) and 33(1)(3) of the ID Act and has also considered the decision of the apex court reported in AIR 1959 SC 1342 and has come to the conclusion that in case the permission is reused, the suspension would be bad and the workman would be entitled to wages from the date of suspension. Now, in this case, it appears that the Corporation has not given any application seeking permission to dismiss the respondent no. 2 workman and since no application was presented, the workman should be paid the wages for the intervening period from the date of suspension till the date of dismissal. Now, looking to the evidence on record, especially Exh. 9 alongwith Exh.10, it appears that the Corporation did submit an application to the Assistant Commissioner of Labour and there is an acknowledgment to that effect. Therefore, it could not be said that no such application was presented by the Corporation. It was presented by the ST Corporation on any date between 27th July, 1980 and 18th October, 1980. The Assistant Commissioner of Labour informed the Corporation that no such conciliation proceedings were pending before the Assistant Commissioner of Labour and, therefore, there is no question of granting any permission. It is true that the conciliation officer, by exh. 10, states that no such application was pending and no further evidence has been led in the matter and, therefore, the tribunal has found it difficult to infer one way or the other but, at the same time, the tribunal has considered that there is positive proof that the corporation has approached the Assistant Commissioner of Labour for granting the necessary permission. Therefore, the tribunal has not granted any wages for the period from 24th July, 1980 to 18th October, 1980 and for the rest of the period, the tribunal has granted the full wages.

I have heard and considered the submissions made by the learned advocates for both the sides. I have also considered the decision of the apex Court reported in AIR 1986 SC 1168 and also 23(2) GLR 708 of this Court. The decision of this court reported in 23(2) GLR 708 relates to the suspension during the permission application and considering the decision of the apex court reported in AIR 1959 SC 1342, held that;

" the ordinary law of master and servant

as to suspension can be and should be held to have been modified in view of the fundamental change introduced by section 33 of the Act and a term should be implied by Industrial Tribunals in the contract of employment that if the master has held a proper enquiry and come to the conclusion that the servant should be dismissed and in consequence suspends him pending the permission required under sec.33, he has the power to order such suspension, thus, suspending the contract of employment temporarily, so that there is no obligation on him to pay wages and no obligation on the servant to work. The undisputed common law right of the master to dismiss his servant for proper cause has been subjected by sec.33 to a ban; and that in fairness must mean that, pending the removal of the said satisfactory ban, the master can after holding a proper enquiry temporarily terminate the relationship of master and servant by suspending his employee pending proceedings under section 33. It follows therefore that if the tribunal grants permission, the suspended contract would come to an end and there will be no further obligation to pay any wages after the date of suspension. If on the other hand, the permission is refused, the suspension would be wrong and the workman would be entitled to all his wages from the date of suspension. "

In paragraph 5 of the judgment, it has been further held as under:

"Therefore, so far as suspension during

pendency of proceedings before a conciliation officer is concerned, Regulation 83(b) of the Regulation can have no application; ..., the employer would be under no obligation during that period to pay any wages or subsistence allowance to the employee under suspension. "

But, subsequently, the apex court in AIR 1986 SC 1168, in case of Fakirbhai Fulabhai Solanki v. Presiding Officer and another, held that;

"The denial of payment of subsistence

allowance to a workman placed under suspension during the pendency of the proceeding under S.33(3) amounts to violation of principles of

natural justice. Since it is difficult to anticipate the result of the application made before the Tribunal it is reasonable to hold that the workman against whom the application is made should be paid some amount by way of subsistence allowance to enable him to maintain himself and members of his family and also to meet with the expenses of the litigation before the tribunal. And if no amount is paid during the pendency of such an application, it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in the proceedings before the Tribunal. Such denial leads to violation of principles of natural justice and consequently vitiates the proceedings before the tribunal under sub section (3) of Section 33 of the Act and any decision given in those proceedings against the workman concerned. There was also no material in this case to show that the appellant had sufficient means to defend himself before the Tribunal.

In para 8 of the said judgment, it has further been held that;

"An unscrupulous management by all possible means delay the proceedings so that the workman may be driven to accept its terms instead of defending himself in the proceedings under sec.33(3) of the Act. To expect an ordinary workman to wait for such a long time in these days is to expect something which is very unusual to happen. Denial of payment of at least a small amount by way of subsistence allowance would amount to gross unfairness."

In view of the decision of the apex Court reported in AIR 1986 SC 1168 (supra) and 1999 Lab. I.C. 1565, now, the law is settled that when the petitioner Corporation has filed permission application before the Conciliation Officer to dismiss the respondent workman and alongwith the permission application, the respondent workman has been suspended without wages. In Fakirbhai's case (supra), it is held that pending the permission application and suspension, the workman is entitled to the suspension allowance according to the service rules of the Corporation and in that, the corporation has to ask before the authority to fix the suspension allowance, according to the service rules. A contention has been raised by Mr. Raval, the learned advocate for the petitioner that the tribunal ought not to have awarded

full wages for the intervening period. At the most, according to the submissions made in paragraph 5 of the petition, the respondent workman is entitled to the subsistence allowance under the relevant rules of the Corporation. ON the other hand, Mr. Chauhan, the learned advocate appearing for the respondent No. 2 has supported the order of the Tribunal but also fairly conceded that during the pendency of the permission application, the respondent workman has been suspended from service and he is entitled to subsistence allowance instead of full wages for the intervening period.

I have considered the decision of the apex Court reported in 1999 Lab. I.C. 1565 in case of M. Pol. Antony vs. Bharat Gold mines Ltd. where the controversy involved in the present matter has been considered by the apex Court in detail and also made observation in respect of the suspension order which has been passed by the employer. In paragraph 26 to 30, the apex Court has observed as under :

- "26. To place an employee under suspension is an unqualified right of the employer. This right is conceded to the employer in service jurisprudence everywhere. It has even received statutory recognition under service rules framed by the various authorities including Government of India and the State Governments(...)Even under the General Clauses Act, this right is conceded to the employer by Section 16, which inter alia provides that power to appoint includes power to suspend or dismiss.
27. The order of suspension does not put an end to an employee's service and he continues to be a member of the service though he is not permitted to work and is paid only Subsistence Allowance which is less than his salary (See : State of MP v. State of Maharashtra, (1977) 2 SCR 555:(1977) 2 SCC 288:AIR 1977 SC 1466).
28. Service Rules also usually provide for payment of salary at a reduced rate during the period of suspension (See Fundamental Rule 53). This constitutes the "Subsistence Allowance". If there is no provision in the Rules applicable to a particular class of service for payment of salary at a reduced rate, the employer would be liable to pay full salary even during the period of suspension.

29. Exercise of right to suspend an employee may be justified on the facts of a particular case. Instances, however, are not rare where officers have been found to be afflicted by 'suspension syndrome' and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employee's trivial lapse which has often resulted in suspension. Suspension notwithstanding non payment of subsistence allowance is an inhuman act which has an unprotitious effect on the life of an employee. when the employee is placed under suspension, he is demolished and the salary is also paid to him at a reduced rate under the nick name of 'Subsistence Allowance', so that the employee may sustain himself. This Court in O.P.Gupta v. Union of India (1987) 4 SCC 328:(AIR 1987 SC 2257) made the following observations with regard to Subsistence Allowance (para 15 of AIR):

'An order of a suspension of a Government servant does not put an end to his service under the Government. He continues to be a member of the service inspite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand v. Union of India (AIR 1958 SC 300) is that he continues to be a member of the Government service but is not permitted to work and further during the period of suspension, he is paid only some allowance-generally called the subsistence allowance-which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental inquiry is concluded within a reasonable time, affects a Government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'subsist' as given in Shorter Oxford English Dictionary Vol. II at pg. 2171 is "to remain alive as on food, to continue to exist'. 'Subsistence" means- means of supporting life, especially a minimum livelihood.

30. If, therefore, even that amount is not paid, then the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of nonpayment of Subsistence Allowance can be linked to slow

poisoning as the employee, if not permitted to sustain himself on account of non payment of Subsistence Allowance, would gradually starve himself to death. "

After considering the submissions made from both the sides and relevant decisions as referred to above, and taking into account the settled legal position, I am of the opinion that instead of the direction given by the Tribunal to pay the full wages from 5th April, 1980 to 27th July, 1982 excluding the period from 24th July, 1980 to 18th October, 1980, the respondent is entitled to the subsistence allowance according to the service regulation 83 of the Corporation for the period from 5th April, 1980 to 27th July 1982 excluding the period from 24th July, 1980 to 18th October, 1980. The petitioner Corporation shall calculate the amount according to the service regulation 83 of the ST Corporation and fix the amount as if the respondent workman has been suspended during the pendency of the departmental proceedings and whatever subsistence allowance he is found to be entitled shall be paid to him for the period as aforesaid and specified by the Tribunal. To that extent, the award of the Tribunal in Reference (IT) No. 26 of 1986 dated 28th January, 1988 is modified. The petitioner Corporation is accordingly directed to pay to the respondent NO. 2 workman amount of subsistence allowance for the period from 5th April, 1980 to 27th July, 1982 excluding the period from 24th July, 1980 to 18th October, 1980 strictly according to service regulation 83 of the Corporation within three months from the date of receipt of the writ of this Court. Rest of the award of the Tribunal is maintained. The petition is accordingly allowed. Rule is made in terms indicated hereinabove with no order as to costs.

24.9.1999. (H.K. Rathod,J.)

Vyas